National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: December 30, 1996

TO: James J. McDermott, Regional Director, Region 31

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Laborers Local 220, (California Department of Corrections), Case 31-CB-9799

177-1683, 177-1683-5000, 177-2470-5000, 177-2484-6200, 536-2531, 536-2545-2900, 536-2581-6767-7500

This Section 8(b)(1)(A) case was submitted for advice as to whether a union which operates an exclusive hiring hall breached its duty of fair representation by discriminatorily making out-of-order referrals to a job with a non-statutory employer.

FACTS

Laborers Local 220 (the Union) operates an exclusive hiring hall pursuant to its collective-bargaining agreement with various statutory employers. Following a 1995 Department of Justice investigation of the Laborers International, all of its locals were required to implement new non-discriminatory hiring hall practices. Under the new rules, all hiring halls are to be exclusive and referrals through them are to be in order based on an out-of-work list.

In January 1996,[(1)] the California Department of Corrections began a job at the Wasco Prison under the state funded California Department of Corrections Inmate Day Labor Program (IDL). The supervisors and employees involved in the program are paid by the State. Under State law, the IDL must use solely union labor. The IDL does not sign contracts with any labor organization, but it pays prevailing wages and makes payments into the various union fringe benefit and pension funds. An IDL supervisor calls the hiring halls of the various trades and requests the number of employees needed. The referring union selects the employees, while the IDL requires only that the employees referred out to the Wasco job fill out an application and take a tuberculosis (TB) test.

Sometime in January, the IDL called the Union and requested some number of Laborers for the Wasco job, a job which lasted about eight months. The Union referred approximately 20 employees from its out-of-work list, although the referrals were not made in sequence. The referrals did not include Charles Owens and Joe Vargas (the Charging Parties) who were numbers 1 and 16, respectively, on the Union's out-of-work list at the time of IDL's request.

Owens and Vargas are long-time members of the Union who were fully qualified to perform any job assigned to any laborer. At the relevant time, there had apparently been long-standing political rivalry and hostility between the two Charging Parties and members of the Union executive board. Owens and Vargas had filed numerous internal Union charges against the present and former executive boards. The Union referred neither Owens nor Vargas for the Wasco job, although it sent many employees who were below them on the list.

In March, Owens asked the Union why he had not been sent to the Wasco job and was told it was because the job required a literate person.[(2)] Owens asserts that he can read and write, and the Union is aware that he can, but his advanced age (76) causes his hand to shake when he writes. Owens also alleges that a fellow Union member heard Union officials saying that they would "starve [Owens] to death."

In May, Vargas asked the Union why it had not referred him to the Wasco job. He asserts that the Union president said that the Union had called him. According to Vargas, when he replied that he had not been called, and that he would "never turn down that kind of job," the Union president said that he would "get" Vargas and "knock his number down."[(3)]

Owens and Vargas filed the instant Section 8(b)(1)(A) charge on May 10, alleging that the Union breached its duty to represent them in good faith by making out-of-order referrals to the California Department of Corrections job at Wasco. In response, the Union contends that the Charging Parties were not referred to the Wasco job because they had not taken the TB test or filled out the required application and were therefore unqualified. In addition, the Union contends that Owens was not sent out because he can "barely" read or write and would therefore be unable to keep the journal required by the job. The Charging Parties contend that the Union did not notify them of the TB and application requirements for the Wasco job.[(4)]

ACTION

We conclude that the instant Section 8(b)(1)(A) charge should be dismissed, absent withdrawal, since the Board's jurisdictional standards have not been met. Therefore, it is unnecessary to reach the merits of the alleged Section 8(b)(1)(A) violation.

In determining whether to assert jurisdiction in cases involving a hiring hall's alleged discriminatory refusal to refer employees to employment with a specific employer, the Board looks to whether the employer to which the employee would have been referred is engaged in commerce within the meaning of the Act and meets the Board's jurisdictional standards, or whether the employer is part of a multiemployer unit which includes employers who are so engaged.[(5)] Thus, in Fisher Theatre, although the Board found that the union's failure to refer an employee to two jobs with employers "engaged in commerce" violated Section 8(b)(1)(A) and (2) of the Act, the Board found no violation with respect to the union's failure to refer the employee to a job with Olympia Stadium, an employer which was not shown to be engaged in commerce within the meaning of Section 2(6) and (7) of the Act.[(6)]

On the other hand, in cases involving a hiring hall's complete refusal to refer an applicant to employers, the Board will assert jurisdiction if any one of the employers to whom the union makes referrals is engaged in commerce within the meaning of the Act.[(7)]

Applying these principles here, we conclude that the instant Section 8(b)(1)(A) charge should be dismissed, absent withdrawal, because the Board's jurisdictional standards are not met. As stated above, the Board will assert jurisdiction over a union for discriminatorily refusing to refer an employee to a specific employer if the employer meets the Board's jurisdictional standards. In this case, the employer to whom the Union discriminatorily refused to refer the Charging Parties, the California Department of Corrections, does not meet the Board's jurisdictional standards. Thus, the California Department of Corrections is not an employer within the meaning of Section 2(2) of the Act. Also, as a state entity, the California Department of Corrections does not meet the commerce requirements of Sections 2(6) and 2(7) of the Act.

The Charging Parties do not assert, and there is no evidence, that the Union discriminatorily refused to refer the Charging Parties to any jobs other than those with the California Department of Corrections. The Charging Parties are complaining only about the Union's refusal to refer them to the Wasco job.

Also, although the Union has a collective-bargaining agreement with a multiemployer bargaining association composed of statutory employers, the California Department of Corrections is not a part of that association or any other multiemployer unit which includes employers engaged in commerce and covered by the Board's jurisdiction. Thus, the Board's jurisdictional standards cannot be met by relying upon those cases that find jurisdiction based upon one or more employers of a multiemployer association meeting the Board's jurisdictional standards. Therefore, we conclude that the Board's jurisdictional standards cannot be met.

Accordingly, the Region should dismiss the instant Section 8(b)(1)(A) charge, absent withdrawal.[(8)]

B.J.K.

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[1] **All dates hereinafter are 1996.**

[2] The Union alleges that the employees at Wasco are required to keep a journal; however, an IDL supervisor indicated that only foremen keep journals. There is no indication that Owens was to be sent as a foreman.

[3] Owens and Vargas were informed, in April and May, respectively, that they had been dropped to the bottom of the out-of-work list. This was apparently done pursuant to the hiring hall rule that an out-of-work member is dropped to the bottom of the list after refusing three jobs of at least 10 days duration.

[4] The Union passed out applications to some members at a monthly membership meeting on February 21. However, this was after the referrals for Wasco had been made. This meeting was not mandatory, and neither Owens nor Vargas was in attendance.

[5] See, e.g., Fisher Theatre, 240 NLRB 678, 690 ((1979); Iron Workers Local 46, 320 NLRB 982 (1996); Plumbers Local 198 (Stone & Webster), 319 NLRB 609, 610 (1995); Marine Engineers District 1 (Dutra Construction Co.), 312 NLRB 55, 56 (1993); Plumbers Local 32 (Alaska Pipeline), 312 NLRB 1137 (1993); Asbestos Workers Local 26 (Griffin Insulation), 311 NLRB 969, 970 (1993); Stage Employees Local 545 IATSE (Greater Miami Opera Assn.), 310 NLRB 763 (1993); Iron Workers Local 601 (Papco, Inc.), 307 NLRB 843 (1992); and IBEW Local 648 (Foothill Electrical Corp.), 182 NLRB 66 (1970).

[6] Fisher Theatre, 240 NLRB at 690. Specifically, the Board affirmed the ALJ's finding that there was "no evidence that the Olympia Stadium is itself engaged in commerce within the meaning of the Act or meets the Board's jurisdictional standards, or that it is part of a multiemployer unit which includes employers who are so engaged." Id.

[7] See, e.g., Stage Employees IATSE Local 412 (Various Employers), 312 NLRB 123 (1993); Carpenters Local 17 (Building Contractors), 312 NLRB 82 (1993); Electrical Workers IBEW Local 1579 (CIMCO), 311 NLRB 26 (1993); Stage Employees IATSE Local 412 (Asolo Center), 308 NLRB 1084, fn. 3, 1085 (1992); Plumbers Local Union No. 119, 255 NLRB 1056, 1057 (1981); and IBEW Local 82, 182 NLRB 59 (1970).

[8] Since the Board's jurisdictional standards cannot be met in this case, it is not necessary to reach the merits of the alleged Section 8(b)(1)(A) discriminatory refusal to refer violation.